ELECTORAL LIES AND THE BROADER PROBLEMS OF STRICT SCRUTINY

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Abstract

States often attempt to regulate political speech in the form of deliberate lies related to ballot initiatives, referenda, candidates, or their political positions. Some courts focus on the various harms of electoral lies, while others focus more on the risks of bias and partisan abuse involved in such speech regulations; the cases are in disarray.

This Article argues, however, that the most important problem underlying this case confusion is inherent in the widely utilized constitutional standard of strict scrutiny. Strict scrutiny typically requires a compelling governmental interest, "narrow tailoring," and some causal relation between the regulation and the compelling interest. The crucial point, though, is that, as this Article documents, each of these elements lends itself to a surprising degree of arbitrariness, judicial subjectivity, uncontrollable complexity, and sheer impracticality. The Article works through these problems, both in the context of electoral lies and much more broadly, and considers two significant possible reforms of standard versions of the judicial strict scrutiny test.

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INTRODUCTION

Neither electoral campaigns nor lies are recent innovations.[1] One might suppose that our judicial system would, by now, have established how best to address the problems of lies and electoral campaigns. Curiously, though, this is not the case.[2] Courts have yet to create a broadly applicable and well-justified approach to lying electoral speech and related problems. And this problem leads directly into much broader and more general problems with judicial strict scrutiny.

This Article illustrates the lack of consensus with regard to a judicial approach to electoral lying, devoting only brief attention to narrowly specific, loosely related problems such as the political libel cases and the actual malice standard. First, this Article discusses the Supreme Court's controversial project of allowing speech categories and classifications, by themselves and without any further judicial analysis, to largely dictate judicial case outcomes. Second, given the prominence of strict scrutiny tests, which require at least a compelling public interest and a narrowly tailored regulation,[3] this Article then discusses whether strict scrutiny tests are of much genuine help in the lying electoral speech cases and elsewhere.

As it turns out, the familiar strict scrutiny tests, here and throughout constitutional law, do not uniquely promote legally constrained, evidence-based, reasonably objective, or well-informed judicial analysis. Instead, strict scrutiny tests only incompletely, arbitrarily, and defectively structure judicial analyses, or merely reflect judicial intuitions. Whether we can reasonably ask the courts for more than such incomplete analyses and intuitions is unclear. Modified versions of a strict scrutiny test are possible; but once we see the courts as unavoidably relying on more or less well-informed judicial intuitions, we will no longer be surprised by any lack of judicial consensus in any legal area involving reliance on a strict scrutiny test.

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1. *See Simon de Montfort, 6th Earl of Leicester*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Simon_de_Montfort,_6th_Earl_of_Leicester (last visited Feb. 17, 2012) (discussing a prototype of an electoral campaign, which apparently required its representatives to be elected at the county or borough level); *see also* JOHN MILTON, PARADISE LOST bk. 5, at 119 (John Leonard ed., Penguin Books 2000) (1667) ("His count'nance, as the morning star that guides / The starry flock, allured them, and with lies / Drew after him the third part of Heav'ns host.").

2. *See infra* Part I.

3. *See, e.g.*, *infra* notes 60–63 and accompanying text. As Part III explores, regulations often fail under strict scrutiny not for lack of a compelling government interest or narrow tailoring, but because the court finds the cause-and-effect linkage between the regulation and sufficient promotion of some designated government interest to not have been shown with sufficient empirical rigor. The wisdom of assuming that everything important can be empirically proven is doubtful.

Let us now concretely introduce some of the basic issues through a look at a recent, controversial, and important electoral speech case, *281 Care Committee v. Arneson*,[4] along with some related cases, in order to fill in the legal landscape and set the stage for some broader conclusions about the stark limitations of judicial strict scrutiny.

I. THE PROBLEM OF LYING ELECTORAL SPEECH

Arneson involved a free speech challenge to a portion of the Minnesota Fair Campaign Practices Act.[5] The Minnesota statutory provision at issue declares:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.[6]

The provision thus focuses on ballot questions rather than on electoral candidates and campaigns (though our interest herein will be on both).[7] Further, the provision in *Arneson* requires merely reckless disregard of falsity or actual malice,[8] as opposed to actual knowledge of falsity.[9] For some purposes below, it will be more useful for us to assume the defendant's actual knowledge of the falsity of the statement in question—that the defendant–speaker engaged in *deliberate* lying.[10]

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4. 638 F.3d 621, 621 (8th Cir. 2011).

5. *Id.* at 625.

6. *Id.* (quoting MINN. STAT. § 221B.06 (2008)).

7. *Id.*

8. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (illustrating the classic statement of the actual malice standard in the political defamation context); *see also* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("[Reckless disregard] is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.").

9. *See* MINN. STAT. § 221B.06.

10. For our purposes, we can treat knowingly and intentionally false claims of fact as synonymous with lies, even if there are some contexts in which not all such claims would be unequivocally considered lies, as well. Consider the case of the hapless spokesperson for a dictator who is required to formally deny what is evident and clear to any observer. The spokesperson declares what he knows to be false, but may have no expectation, and no desire, of persuading any listener. Whether that intentionally false statement should also count as a lie is at least debatable. One might also argue that communicating a known falsehood to someone who does not deserve that truth—as in the case of a would-be murderer seeking information—should

In *Arneson*, the district court determined that the type of speech at issue—to oversimplify, we will assume knowingly false factual claims about a ballot measure—was categorically outside the scope of First Amendment protection.[11] In this, the district court followed, if it did not expand upon, the general logic of *Chaplinsky v. New Hampshire*.[12] The underlying rationale in *Chaplinsky* was that "the right of free speech is not absolute at all times and under all circumstances."[13] *Chaplinsky* crucially concluded:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that *such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[14]

Of course, cases after *Chaplinsky* have brought some, if not all, of the supposedly exempted categories of speech within the scope of the First Amendment.[15] But the underlying idea that certain kinds of literal speech fall outside of, or are unprotected by, the Free Speech Clause

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in some sense not count as a lie. For useful general discussions of the precise meaning and status of lying, see, for example, SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (2d ed. 1999); THOMAS L. CARSON, LYING AND DECEPTION: THEORY AND PRACTICE (2010); MARTIN JAY, THE VIRTUES OF MENDACITY: ON LYING IN POLITICS (2010); THE PHILOSOPHY OF DECEPTION (Clancy Martin ed., 2009); James Edwin Mahon, *The Definition of Lying and Deception*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 21, 2008), *available at* http://plato.stanford.edu/archives/fall2008/entries/lying-definition/. For a valuable historical perspective, see PAUL J. GRIFFITHS, LYING: AN AUGUSTINIAN THEOLOGY OF DUPLICITY (2004). For numerous further relevant citations, see R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. (forthcoming 2012).

11. *See Arneson*, 638 F.3d at 633.

12. 315 U.S. 568, 571–72 (1942).

13. *Id.* at 571.

14. *Id.* at 571–72 (emphasis added) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

15. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (discussing obscenity); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (discussing libel of public officials).

retains a certain appeal.[16]

We can imagine someone saying that deliberate lies in the electoral context are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[17] If a deliberate lie can be a step to the truth, it is at best an indirect step. More typically, we would think of a deliberate lie as a step away from the truth.[18]

The court in *Arneson*, however, concluded that even if defamation were unprotected or only modestly protected speech, then nondefamatory electoral lies might well deserve greater free speech protection.[19] Speech defaming a political figure is not only false, but also is presumably injurious to the victim's reputation or other private interests.[20] But as the court observed, "A ballot initiative clearly cannot be the victim of a character assassination."[21]

Nor did the appellate court in *Arneson* feel at liberty to take up, on its own independent merits, the question of whether the category of deliberate electoral lies should fall outside the scope of the Free Speech Clause.[22] Here, the court felt bound by the Supreme Court's argument in the recent animal cruelty video case of *United States v. Stevens*.[23] The court understandably took *Stevens* to broadly prohibit courts from conducting a category-based assessment of whether a certain kind of speech, independent of viewpoint, is appropriate for free speech protection in light of its free speech value and other costs and benefits.[24] This prohibition would presumably include judicially considering the

16. Consider, for example, forged endorsements, ransom notes, bank stick-up instructions, etc. For the distinction between the logical scope and the range of protection of the Free Speech Clause, see Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 697 (1997).

17. *Chaplinsky*, 315 U.S. at 572.

18. We might distinguish a lie from an allegory, a parable, or a metaphor intended to convey a truth, as in the case of PLATO, THE REPUBLIC OF PLATO, ch. X, III, at 106 n.1 (Francis MacDonald Cornford ed. & trans., 1941, Oxford Univ. Press ed. 1990) (c. 360 B.C.E.).

19. *See* 281 Care Comm. v. Arneson, 638 F.3d 621, 634–35 (8th Cir. 2011).

20. *See id.* at 634.

21. *Id.*

22. *See id.* at 635.

23. 130 S. Ct. 1577 (2010). For further discussion, see the majority opinion of Justice Antonin Scalia, and the opinion of Justice Samuel A. Alito, Jr. concurring in the judgment, in the rental of violent video games to minors case of *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011).

24. *Arneson*, 638 F.3d at 635 (quoting *Stevens*, 130 S. Ct. at 1585). As our discussion below suggests, reasonably assessing the free speech and other costs and benefits of some questionably defined category of speech is likely to be more complex than is often appreciated. Of course, some serious risks of any legal regime's regulation of its opponents' electoral speech will seem obvious enough. *See, e.g.*, R. H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2 (1977).

category of deliberate electoral lies.

Crucially, the *Stevens* Court had proclaimed any such "free-floating"[25] categorical balancing test to be "startling and dangerous."[26] Instead, it looked to some combination of the constitutional text,[27] longstanding historical traditions of speech regulations,[28] a distinction between merely descriptive and genuinely prescriptive Supreme Court language,[29] and special exceptions,[30] rather than to a "highly manipulable balancing test."[31] The *Stevens* Court's desire to discourage vague balancing tests in determining the scope of free speech protection is certainly understandable. But the *Stevens* Court's own multifaceted approach, adopted in *Arneson*,[32] is no less problematic, for a variety of reasons.

First, the constitutional text does not tell us what kinds of speech, literal or otherwise, count as speech for free speech purposes. The Constitution does not even define "speech" in the first place. The First Amendment does not itself decide for us that computer code translatable into instrumental music or purely commercial nude dancing count as speech, but that social dancing, public nude sunbathing, forged documents, and kidnapping ransom notes from a political group do not.[33] We must make such decisions based on some sort of reasoning about why we wish to specially protect certain speech.[34] To pretend that the Constitution defines "speech" or otherwise states how to make these classifications is, at best, to beg the question.

Second, looking to longstanding historical traditions, and particularly to case law, to decide what counts as protection-worthy speech invites the questions raised by any case law precedent: Are persons entitled to rely on precedent in perpetuity? And what justified the original judicial decision? An "original" judicial decision, by definition, cannot rely on longstanding precedent. Is it not possible that our communications technology or our broader culture may have changed over time in ways that make the original judicial decision classification less defensible?[35] More broadly, why could our culture

25. *Stevens*, 130 S. Ct. at 1585.

26. *Id.*

27. *See id.*

28. *See id.*

29. *See id.* at 1585–86.

30. *See id.* at 1586.

31. *Id.*

32. *See* 281 Care Comm. v. Arneson, 638 F.3d 621, 635 (8th Cir. 2011).

33. *See* R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010) (suggesting a multifactored approach to defining the scope of protected speech).

34. *See id.*

35. Is it possible, for example, that the cultural respectability of pure racial epithet speech

and technology not change in ways that occasionally result in a new form of activity that contributes little as speech but imposes serious costs to free speech and other important constitutional values?

Third, the *Stevens* Court's attempt to classify the underlying logic of the *Chaplinsky* case[36] as merely descriptive, rather than prescriptive or action-guiding,[37] is less than convincing. *Chaplinsky* asserts that certain kinds of utterances are not an "essential part of any exposition of ideas,"[38] and therefore, given their presumed nature and effects, are not worth special constitutional protections.[39] Admittedly, accepting this idea does not guarantee the motive to prescriptively apply it, even as one factor among others, in any given case.[40] But if a court were to accept *Chaplinsky*'s descriptive logic, such a court would have at least a prima facie, rebuttable, but action-guiding reason actually to apply (rather than to ignore) the rationale of *Chaplinsky*. It is frankly difficult to envision the Supreme Court dismissing the underlying rationales of its own opinions as merely descriptive, and not also prescriptive, on a consistent basis.

Fourth, while the *Stevens* Court argued that some cases may have considered the minimal communicative value of the particular category of speech in question,[41] along with the public interest in prohibiting such speech,[42] the Court argued that such decisions also relied on a clear connection between the prohibited speech and some underlying nonspeech activity that is itself criminal.[43] In this narrow class of exceptions, though, should underlying activity that is not criminal, but is tortious or consistently costly to defenseless victims, not also count when deciding whether to protect the kind of speech in question?

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has changed over the past two centuries? *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

36. *See supra* text accompanying note 18.

37. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).

38. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

39. *See id.* at 571–72.

40. As philosopher David Hume famously stated, "Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger." DAVID HUME, A TREATISE OF HUMAN NATURE bk. 2, pt. 3, sec. 3, at 267 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press ed. 2007) (1740). Hume's claim is controversial, but the *Stevens* Court's distinction between the merely descriptive and the prescriptive in *Chaplinsky* seems both dubious and unlikely to be applied consistently. If we "describe" a person as displaying cowardice, it will not be easy to avoid inferring that we should not imitate the person in that respect.

41. *See Stevens*, 130 S. Ct. at 1586.

42. *See* McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

43. *See Stevens*, 130 S. Ct. at 1586 (citing the non-computer-generated child pornography case of New York v. Ferber, 458 U.S. 747, 756–64 (1982)). The *Stevens* Court in also referred to formulations like the *Chaplinsky* rationale, when applied as a judicial test, as "highly manipulable." *Id.* at 1586.

It should also be noted that the *Stevens* Court referred to *Chaplinsky*'s rationale,[44] when applied as a judicial test, as a "highly manipulable balancing test."[45] Where *Chaplinsky* would actually rank on a manipulability scale, compared to other well-established and typically unquestioned Supreme Court tests, is subject to debate.[46] As emphasized below,[47] the familiar strict scrutiny test used in several constitutional contexts is subject to a remarkable degree of judicial manipulation.

Based on the arguments of *Stevens*, then, there is actually little reason not to apply the basic logic of *Chaplinsky* to *Arneson*. *Stevens* gives courts little reason not to ask of any fairly described kind of speech whether that speech in general is likely to begin to repay the costs it imposes, in terms of free speech and other values. This seems, for all anything *Stevens* says to the contrary, a fair, sensible, practical, and relevant question to ask of the category of deliberate electoral lies, as suggested by *Arneson*.

Of course, there may be better reasons than those offered in *Stevens* not to apply *Chaplinsky*'s basic logic to deliberate electoral lying. After all, deliberate electoral lies still fall within the category of "quintessential political speech,"[48] which is at the very heart of free speech protection.[49] And even then, there should be no guarantee in advance as to whether deliberate lying electoral speech would pass any *Chaplinsky*-style categorical exclusion test.[50]

There is no reason in principle why a *Chaplinsky*-type speech categorical balancing test could not take into proper account any

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44. *See supra* emphasized text accompanying note 14.

45. *Stevens*, 130 S. Ct. at 1586.

46. For one example among numerous possible contenders, see Justice Scalia's opinion of the *Lemon* test in *McCreary County*, 545 U.S 844, 900 (2005) (Scalia, J., dissenting): "As bad as the *Lemon* test is, it is worse for fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."

47. *See infra* Parts II, III.

48. 281 Care Comm. v. Arneson, 638 F.3d 621, 635 (8th Cir. 2011).

49. The special status of pure political speech is recognized in cases such as *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966), and *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964), as well as in the more recent cases of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 898 (2010), and the military funeral protest case of *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). There are, of course, a range of other relevant considerations, including decisionmaker bias, debatable or borderline cases, speech-chilling effects, and the possible need to protect some lies in order to give breathing space to the truth. *See Arneson*, 638 F.3d at 636; *Garrison*, 379 U.S. at 74 (invoking the need for breathing space in the public official defamation "actual malice" test context); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

50. For merely one complication among others, some deliberate political, if not electoral, lies may contribute directly or indirectly to civilized values. *See* Wright, *supra* note 10. On the other hand, electoral lies may do more harm to electoral politics, authority, legitimacy, governance, and political speech itself than other forms of deliberate lying.

constitutionally relevant consideration, including, if appropriate, some or all of what is normally considered under a strict scrutiny test. In fact, several cases do apply the basic *Chaplinsky* test to some forms of deliberate political lies and find such lies as a category to be unworthy of special free speech protection.[51]

But if we nonetheless choose to follow *Stevens*[52] and *Arneson*,[53] we naturally wind up applying some form of the familiar strict scrutiny test[54] to content-based[55] restrictions on deliberate electoral lies. We are thus left with a familiar strict scrutiny test for regulation of even deliberate electoral lies, under which the government must establish a genuinely compelling public interest[56] promoted by the regulation,[57] as well as sufficient causation, and narrow tailoring,[58] or only minimal overinclusiveness and underinclusiveness of the scope of the speech regulation.

The strict scrutiny test, in general and in the context of electoral lying, is ironically rarely subject to broad critical scrutiny.[59] While this Article cannot undertake a truly comprehensive examination of judicial strict scrutiny across all contexts, it does suggest many important general problems in the applied logic of strict scrutiny in the electoral-lying context and elsewhere.

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51. *See, e.g.*, Pestrak v. Ohio Elections Comm'n, 926 F.2d 573, 577 (6th Cir. 1991) ("False . . . political speech[] does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth." (citing *Garrison*, 379 U.S. at 75)); Ohio Democratic Party v. Ohio Elections Comm'n, No. 07AP-876, 2008 WL 3878364, at *3 (Ohio Ct. App. 2008).

52. *See* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

53. *See Arneson*, 638 F.3d at 636.

54. *See id.*; *Stevens*, 130 S. Ct. at 1584.

55. *See, e.g.*, R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

56. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898–99 (2010) (suggesting that any departure from strict scrutiny for content-based regulation of political speech might be in the direction of an even more rigorous test, perhaps including an absolutist categorical protection for political speech, and distinguishing a number of cases in which the content-based regulation of political speech was deemed necessary for some agency of government, including public schools, to perform its assigned task).

57. *See id.*; Brown v. Hartlage, 456 U.S. 45, 53–54 (1982) ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); Burson v. Freeman, 504 U.S. 191, 198 (1992); State v. 119 Vote No! Comm., 957 P.2d 691, 697, 699 (Wash. 1998) (en banc) (holding a state statute prohibiting malicious sponsoring of false statements of material political fact to be facially unconstitutional).

58. *See supra* notes 51–53 and accompanying text.

59. *See Arneson*, 638 F.3d at 636; *Stevens*, 130 S. Ct. at 1584.

II. SCRUTINIZING STRICT SCRUTINY

Under the most familiar strict scrutiny formula, a government seeking to regulate deliberate electoral lying on the basis of its content would have to show the necessary causal connection, and that such regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[60] This is generally regarded as a demanding test, though not so demanding as to be "strict in theory, but fatal in fact."[61]

As we might imagine, though, each component of such a strict scrutiny test, as well as the overall test itself, is open to some degree of subjectivity and to conscious or subconscious manipulation. In the absence of a perfectly drafted regulation, some degree of regulatory overinclusiveness or underinclusiveness, and thus some imperfection in tailoring, is inevitable.[62] There are no objective, readily recognized, and readily applicable criteria for determining when merely imperfect tailoring becomes constitutionally insufficiently narrow tailoring.[63]

What should count as a genuinely compelling (rather than a merely substantial) governmental interest[64] is similarly murky. Interests do not come labeled as compelling or less-than-compelling. A strong, widely shared, emotional interest could be illegitimate. To find an interest to be either genuinely compelling or slightly less than compelling typically requires broad reflection and the exercise of sound moral and practical judgment in several distinct respects.

In the cases of alleged lying in electoral contexts, several possible regulatory interests might be invoked. A legislature might seek, for example, to protect potential targets from the emotional, distracting, defamatory,[65] and other effects of deliberate electoral lies. Or a legislature might choose to regulate such speech in an attempt to promote, to one degree or another, "the integrity of elections."[66] It is important to recognize that these formulations all refer to at least somewhat different interests. These interests could diverge. They are not all basically alternative ways of referring to the same governmental

60. Rickert v. State, 168 P.3d 826, 828 (Wash. 2007) (en banc) (quoting *Burson*, 504 U.S. at 198) (internal quotation marks omitted).

61. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)) (internal quotation marks omitted); *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010). For a stringent electoral speech interpretation, see *119 Vote No! Comm.*, 957 P.2d at 696–97.

62. *See, e.g.*, R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 183–87 (1997).

63. *See id.* at 183–87, 195–98.

64. *See generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

65. *See Rickert*, 168 P.3d at 829–30.

66. *Id.* at 830.

interest.

In any event, at least some of these interests have been held to be less than compelling, at least considered separately and in isolation from the others.[67] One might certainly expand the range of possible interests. A legislature could be concerned that electoral lies might deter highly capable potential candidates from running in the first place. Legitimacy and authority could be at stake, albeit in ways difficult to prove. Or a legislature might seek to promote, again to some unspecifiable degree, not so much the integrity of elections, but the civility of electoral discourse or political campaigning.[68]

A legislature might also seek to regulate electoral lies on a theory that involves both paradox and common sense. We might call this the public interest in the value of free speech. Let us consider an analogy to the flow of speech in the flow of water. Again, all problems of effectiveness, implementation, and abuse set momentarily aside, we have some interest in both the volume of a water flow and in the purity or toxicity of the water flow. The best combination of volume and purity of water flow will depend upon purpose and context. If we seek to extinguish a house fire, volume of flow will be high priority. Some degree of contamination of that flow of water will typically be acceptable. A reasonable legislature could seek to adjust downward the degree of "contamination" in the form of deliberate electoral lies, even at the cost of some reduction in the overall volume or flow of electoral speech. If the flow of information becomes too contaminated, our "filtering" costs as citizens and potential voters may rise, or we may even stop drinking from the contaminated flow of electoral speech entirely.

Some might characterize any concern for the contamination of flow, in the narrow sense of deliberate electoral lies, as a matter of "an informed electorate."[69] But a broad concern for an informed electorate might also take the form (with less burden on speech) of, say, a reformed public school curriculum.[70] This is the beginning of a narrow tailoring problem. And the real aspiration might not be to a genuinely informed electorate, but to an electorate that is simply not deliberately misinformed in easily avoidable ways. As an electorate comes to fear deliberate electoral lies, its otherwise unnecessary "filtering" of speech

67. *See id.* at 829–31.

68. For some relevant considerations, see generally R. George Wright, *Self-Censorship and the Constriction of Thought and Discussion Under Modern Communications Technologies*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 123 (2011).

69. State v. 119 Vote No! Comm., 957 P.2d 691, 697 (Wash. 1998) (en banc).

70. *See, e.g.*, R. George Wright, *The Law of Education: Educational Rights and the Roles of Virtues, Perfectionism, and Cultural Progress*, 31 N. ILL. U. L. REV. 385, 390 (2011) (advocating the legal reform of public education to promote basic personal and civic virtue, developmental perfectionism, and cultural progress over time).

may increase—if the electorate does not simply become more apathetic, cynical, jaded, and distrustful of and alienated from the electoral process in general. But apart from cases of actual defamation,[71] an interest in fostering "an informed electorate" has been held insufficiently compelling to justify state regulation of false electoral speech.[72]

This is not to suggest that courts agree on all of the interests and combinations of interests that fall short of "compelling" in the electoral lying context. Courts' differences on what counts as compelling do not really seem to hinge on subtleties of phrasing or the level of generality of the interest's formulation. Instead, the differences in judicial outcomes regarding what is compelling seem more substantive. For example, an Ohio court declared, "It is a very compelling state interest to promote honesty in the election of public officers."[73] More elaborately phrased: "There is indeed a compelling state interest in preventing the publication of false statements concerning candidates for election to office where such statements are purposely published with full knowledge of the falsity thereof and are designed to promote the election or defeat of a candidate for office."[74]

The cases, in general, typically do not clarify how one would know whether a state interest, pursued with one speculative degree of success or another, at some unpredictable overall cost or another, should count as compelling. Common sense suggests that whether an interest is compelling or perhaps overridingly important reflects not only the interest itself, but also the costs of pursuing that interest. Most, if not all, compelling interests are compelling in context, given some assumed set of costs. "Compellingness," then, is really a matter of comparison with alternatives.

The costs of pursuing any government interest take the form, in part, of being unable thereby more fully to pursue other valued government interests.[75] This suggests that no government interest is ever compelling in itself. Whether a government interest is compelling or, if we like, overridingly important cannot be separated from some implicit assessment of or sheer guess at the degree to which the goals of the regulation in question are likely to actually be promoted when compared to some alternative policy.[76] Nor can we responsibly say that

71. *See 119 Vote No! Comm.*, 957 P.2d at 697.

72. *Id.*

73. DeWine v. Ohio Elections Comm'n, 399 N.E.2d 99, 103 (Ohio Ct. App. 1978).

74. *Id.* This language was later adopted in the Ohio case of *State v. Davis*, 499 N.E.2d 1255, 1258 (Ohio Ct. App. 1985) (quoting *DeWine*, 399 N.E.2d at 103).

75. This is simply a matter of "opportunity costs." *See, e.g.*, *Opportunity Costs, Economics A-Z Terms Beginning with O*, ECONOMIST, http://www.economist.com/economics-a-to-z/o (last visited Feb. 17, 2012).

76. *See id.*

an interest is overriding until we consider its various likely costs, as best as we can reasonably, but quite fallibly, foresee them.[77] Biases in guessing costs are often built-in. And these costs must include whatever value, or disvalue, of overinclusiveness and underinclusiveness is deemed likely to follow from applying the regulation over some period of time.

We thus cannot generally say that an interest is compelling in the abstract. "Compellingness" is relative. Whether consciously or not, judges may intuitively (albeit speculatively) take the likely costs and benefits of underinclusive and overinclusive regulations into account when deciding whether the cited government interest counts as compelling. Judges may not undertake this inquiry with much rigor. The costs and benefits of underinclusiveness and overinclusiveness are partly a matter of constitutional law and partly a matter of the judge's values. Even then, the questions of whether a government interest is compelling and whether a regulation is sufficiently narrowly tailored are really not separate and distinct.

The degree of regulatory tailoring thus should be factored in, to one degree or another, when determining whether the underlying interest is genuinely compelling. Put simply, the very idea of an interest being compelling is itself already contextual, deeply comparative, and intricately interconnected. No interest is realistically compelling on its own or apart from alternatives and the various costs of its pursuit.

Sometimes the real inseparability of the "compellingness" question, and the degree of tailoring, among other costs of implementation, is judicially obscured. Courts sometimes say that what appears to be a desirable and important government interest is actually illegitimate or somehow ruled out as an interest. Consider, for example, the language of the *Rickert v. State* case.[78] The *Rickert* majority concludes, even with regard to knowingly false electoral statements, that "there simply cannot be any legitimate, let alone compelling, interest in permitting government censors to vet and penalize political speech about issues *or* individual candidates."[79] Note that the court here does not concede the possibility of some compelling government interest in this context, but nevertheless goes on to address matters of narrow tailoring, abuse, and practical implementation.

We sense the "relationality" of any supposedly compelling government interests when we consider the earlier *119 Vote No!* case.[80] The majority in this case declared, more specifically than the later

77. *See id.*

78. 169 P.3d 826 (Wash. 2007) (en banc).

79. *Id.* at 830.

80. *See* State v. 119 Vote No! Comm., 957 P.2d 691, 698–99 (Wash. 1998) (en banc).

Rickert majority,[81] that "the State's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic."[82] The majority concluded, "At its worst the statute is pure censorship, allowing government to undertake prosecution of citizens who, in their view, have abused the right of political debate."[83]

However much sympathy we may have for this underlying judicial view, there seems to be here an odd and implausible literal claim that there cannot be any legitimate, let alone compelling, interest in an electoral campaign with fewer deliberate lies.[84] But a far more persuasive analysis would then bring in considerations of abuse, likely cost, and narrow tailoring. Overinclusiveness and underinclusiveness are matters of narrow tailoring or the lack thereof.[85] The foreseeable abuse of a regulation may also go to narrow tailoring. And the abuse of a speech regulation, such that some deliberate lies are tolerated, while some truths or merely careless or debatable errors are deterred, expensively litigated, or actually punished, is more naturally a matter of the degree of tailoring. The compelling or even legitimate nature of an interest cannot be separated from issues of implementation, enforcement, possible and actual consequences, likely abuse, and the degree of the regulation's tailoring.[86]

Sometimes, the inseparability of the government interests at stake and the degree of tailoring take on a further dimension of complexity. We often do things for many distinct reasons. More than one governmental interest can underlie regulation of deliberate electoral lies,[87] just as more than one interest can underlie, say, affirmative action in higher education.[88] Even if no single interest by itself rises to the level of the genuinely compelling, a number of the relevant interests, taken jointly and even cumulatively, might.[89] But how is a court to assess the presence or absence of narrow tailoring in such a multipurpose "cumulative" case?[90]

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81. *See Rickert*, 169 P.3d at 830.

82. *119 Vote No! Comm.*, 957 P.2d at 698 (citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223–24 (1989)).

83. *Id.* at 699.

84. *See id.*

85. *See supra* notes 60–62 and accompanying text.

86. *See 119 Vote No! Comm.*, 957 P.2d at 698–99.

87. *See supra* notes 65–82 and accompanying text.

88. *See* R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE. L. REV. 1, 12–35 (2002).

89. *See id.* at 4–12. For broader background, see also J.C. Thomas, *Cumulative Arguments for Religious Belief*, 21 SOPHIA 37 (1982).

90. If we have half a dozen distinct reasons for some rule or policy, the boundary lines between pursuing and no longer pursuing the likely ill-defined policy will often be difficult to

Worse, how is a narrow tailoring inquiry to accommodate the plain fact that our most thoughtful actions and policies do not seek to maximize any single objective? Our actions do not seek to achieve some single goal, with no concern for other goals, or for costs and conflicts. Instead, they roughly accommodate several of our partly conflicting and partly reinforcing priorities, to one degree or another.[91] There is a difference between a carelessly drafted rule that is thoughtlessly overinclusive and underinclusive and a rule that is in some sense overinclusive or underinclusive or both, only because this is an unavoidable price to pay for accommodating our partly conflicting interests. We do not, for example, usually pack a lunch to maximize nutrition, or taste, or convenience, or social impressiveness, or speed, or cost-effectiveness; neither, by analogy, does the most reasonable legislature in adopting a statute, especially in the supportive context of any enacted legislation. But the complications that strict scrutiny analysis must confront are really only beginning.

III. STRICT SCRUTINY AND THE UNMANAGEABLE COMPLICATIONS OF THE REAL WORLD

It often makes sense for courts, given their unavoidable limitations, to defer to the judgment of a legislature. This is especially true on questions of the possible costs and the degree of effectiveness of legislation or the realistic feasibility of alternative ways of approaching the same or somewhat similar legislative goals.[92] What may seem feasible to a court may be politically or technically unrealistic. What counts as a similar goal, or as similar outcome, may be politically controversial. Even apart from separation of powers issues and institutional comparative advantage concerns, humility remains a virtue.[93]

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detect.

91. How, in particular, is a court to assess tailoring to a presumed state "interest," when the state—like most people—pursues some vague, unarticulated combination of partly conflicting and partly overlapping, if not reinforcing, goals? We could say that only a saint or a fanatic even approaches seeking to maximize, over the course of a day, some particular value, or even the unarticulated weighted sum of several values. For a close theoretical approach, see SOREN KIERKEGAARD, PURITY OF HEART IS TO WILL ONE THING (Douglas V. Steere trans., 1938) (Harper ed. 1956) (1846).

92. At a minimum, courts often write that it is not within their province to second-guess congressional wisdom. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 222 (2003); *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1217 (2009); Harbison v. Bell, 129 S. Ct. 1481, 1492, 1494 (2009) (Thomas, J., concurring in the judgment); Clinton v. New York, 524 U.S. 417, 447 (1998); TVA v. Hill, 437 U.S. 153, 194 (1978).

93. *See, e.g.*, BERNARD OF CLAIRVAUX, ON THE STEPS OF HUMILITY AND PRIDE, *in* SELECTED WORKS 99, 103 (Gillian R. Evans trans., 1987) (1124) ("The fruit of knowledge of truth is humility."); CAJETAN MARY DA BERGAMO, HUMILITY OF HEART 38 (Herbert Cardinal Vaughan trans., 1903) (2006 ed.) ("[H]umility . . . is founded on truth and justice"). Notice also

But once courts try to apply some vision of strict scrutiny, the important complications quickly multiply beyond anyone's comprehension. Consider the assumption that the speech regulation in question is intended to cause one or more desired effects. Now, the very idea of causation in this sense may seem clear enough, and for present purposes, we may treat the idea of causation as clear. But we should at least note for the record that at some level, the very idea of causation remains contested, if not mysterious.[94]

Let us nevertheless set aside any such deep uncertainties and consider the more practical problems of the causal complexities involved in strict scrutiny analysis. One form of causal complexity with which strict scrutiny must work has been referred to as "causal density."[95] Consider an example of the important problem of causal density. We can object to the tone and content of many electoral campaigns,[96] and sometimes to their demagoguery, pandering,

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that a regulated party may have an incentive to falsely claim that some alternative is less burdensome on its own free speech rights, or on those of other parties not before the court, when the alternative's only real advantage is that it is far less costly, in financial terms, on the regulated party.

94. Interestingly, some approaches to the very idea of causation already build in an emphasis on policymaking and other intentional choices and interventions. *See, e.g.*, JAMES WOODWARD, MAKING THINGS HAPPEN: A THEORY OF CAUSAL INTERVENTION 12 (2003) ("[A] very central part of the commonsense notion of cause is precisely that causes are potential handles or devices for bringing about effects."). Causation in senses relevant to a strict scrutiny test may rise no higher than statistical probabilities. *See* Adrian Heathcote & D.M. Armstrong, *Causes and Laws*, 25 NOÛS 63, 63 (1991) ("[T]he *fundamental* laws that govern causal processes may be no more than probabilistic."). And we may understand and control much about a situation while still not understanding the causal relations that actually obtain in the situation. *See* Michael Tooley, *Causation: Reductionism Versus Realism*, 50 PHIL. & PHENOMENOLOGICAL RES. 215, 225 (Supp. 1990). For further discussions illustrating the variety of contemporary understandings of the idea of causation, see, for example, David Lewis, *Causation*, 70 J. PHIL. 556 (1973); J. L. Mackie, *Causes and Conditions*, 2 AM. PHIL. Q. 245 (1965); Jonathan Schaffer, *The Metaphysics of Causation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/causation-metaphysics (last updated Aug. 13, 2007). For an emphasis on questions of causation in the social sciences, see CAUSAL EXPLANATION FOR SOCIAL SCIENTISTS (Andrew P. Vayda & Bradley B. Walters eds., 2011); Henry E. Brady, *Causation and Explanation in Social Science*, *in* THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY ch. 10, at 217 (Janet M. Box-Steffens Meier et al. eds., 2008), *available at* http://www.oxfordhandbooks.com/oso/private/content/oho_politics. For a useful and concise introduction to the idea of causation as variously used in the law, with helpful links and citations, see Lawrence Solum, *Legal Theory Lexicon 020: Causation*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le.html (last visited Feb. 17, 2012).

95. *See* Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J., http://www.city-journal.org/2010/20_3_social-science.html (last visited Feb. 17, 2012) (noting the variability of "the number and complexity of potential causes of the outcome of interest" and "causal density").

96. *See generally* STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW

emptiness, and infantilism. But these unavoidable electoral phenomena do not have simple, clear, obvious, empirically provable, unique, legislatively addressable causes. And this causal multiplicity, complexity, and uncertainty is typical. Generally, in matters of social causation, "[o]ur scientific ignorance of the human condition remains profound."[97] We should expect campaign abuses, like most problems addressed by legal regulation, to have more than one important if difficult-to-establish cause.[98]

Any cause may also have multiple effects.[99] Some effects may be favorable, others not. Some effects, often the most favorable, may appear immediately, with the possibly disastrous and unprecedented costs arriving only over time, when it may be realistically too late to change course.

And not all causes operate in similar ways.[100] One or more causes may have self-cancelling or mutually cancelling effects.[101] It is also possible that two or more causes may interact and have not merely an additive, but a multiplicative, effect.[102] The number and variety of the causal complications with which legislators, and judges applying strict scrutiny, are confronted is daunting.[103] What one social scientist has said holds distinctly true for legislators and judges: "We do not know how to study [culture] in a way that produces hard numbers and testable theories. Culture is the realm of novelists and biographers, not of data-driven social scientists."[104]

Judges trying to apply strict scrutiny thus can expect only limited help from social scientists. Directly applicable and thoroughly rigorous

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POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE (1997) (discussing the impact and consequences of negative political advertisements).

97. Manzi, *supra* note 95.

98. *See* Paul Humphreys, *Causation in the Social Sciences: An Overview*, 68 SYNTHESE 1, 1 (1986) (presuming multiple causal influences and multiple effects of each causal factor); Maarten Chrispeels, *Rising Food Prices: Multiple Causes but No Easy Solutions*, SAN DIEGO UNION TRIB., May 9, 2008, at B7 (citing at least four concurrent causes).

99. *See supra* note 98. *See generally* Nancy Cartwright, *Causation: One Word; Many Things*, CTR. FOR PHIL. NAT. & SOC. SCI. (2002), http://www2.lse.ac.uk/CPNSS/pdf/DP_withCover_Causality/CTR07-03-C.pdf (arguing that there exists a great variety of kinds of causes and that causes of the same kind can operate in different ways).

100. *See* Cartwright, *supra* note 99, at 3, 12.

101. *See id.* at 4.

102. We will consider a medical example. Such a multiplicative effect on the risk of dying from heart disease may result from the combination of Type 2 diabetes and depression, with the relevant causal mechanisms not yet being understood. *See* An Pan et al., *Increased Mortality Risk in Women with Depression and Diabetes Mellitus*, 68 ARCHIVES GEN. PSYCHIATRY 42, 42 (2011).

103. *See supra* notes 92–102 and accompanying text.

104. James Q. Wilson, *Hard Times, Fewer Crimes*, WALL ST. J., May 28, 2011, at C1, *available at* http://online.wsj.com/article/SB10001424052702304066504576345553135009870.html.

empirical studies are, for any given judicial case, unlikely to exist. This will be as true in the free speech arena as elsewhere. And for a variety of reasons, any available studies, particularly on controversial, hot-button, or high-stakes issues, are likely to be inconclusive, misleading, questionable, or mistaken.[105] Whether a court chooses to excuse or discount such inevitable deficiencies is largely a matter of the court's preferences.[106]

Courts attempting to apply strict scrutiny responsibly in any context thus cannot typically rely on directly relevant and well-executed social science studies.[107] But applying strict scrutiny in the electoral speech or any other context should, ideally, be a defensible judicial process, addressing relevant considerations and somehow reaching defensible results. Courts must somehow make an inescapably comparative judgment as to whether one or more interests, alone or in combination, could be called compelling, in light of their various more or less likely eventual costs and alternatives. Some judicial conclusions must somehow be reached as to the degree to which one or more interests or some similar interests will likely be advanced in practice,[108] again given the predicted costs.[109] Some errors, such as the partisan

105. *See* John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 0696, 0699 (2005). For commentary, see, for example, David H. Freedman, *Lies, Damned Lies, and Medical Science*, ATLANTIC, Nov. 2010, *available at* http://www.theatlantic.com/magazine/archive/2010/11/lies-damned-lies-and-medicalscience/8269/ (ultimately emphasizing the role of well-informed professional "instinct" or intuition, with diminished expectations); Robert Lee Hotz, *Most Science Studies Appear to Be Tainted by Sloppy Analysis*, WALL ST. J., Sept. 14, 2007, at B1, *available at* http://online.wsj.com/article/SB118972683557627104.html; *Scientific Journals: Publish and Be Wrong*, ECONOMIST, Oct. 9, 2008, *available at* http://www.economist.com/ node/12376658; *see also* Jonathan A.C. Sterne & George Davey Smith, *Sifting the Evidence—What's Wrong with Significance Tests?*, 81 PHYSICAL THERAPY 1464 (2001).

106. *See supra* notes 94–104.

107. But consider the Court majority's criticisms of Professor David Baldus' death penalty studies in the instructive case of *McCleskey v. Kemp*, 481 U.S. 279, 286–97 (1987). In contrast, note the Court's generosity in accepting empirical evidence of quite limited rigor in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52–53 (1986). *Renton*, it should be noted, however, applied intermediate rather than strict scrutiny. *See id.* at 50.

108. Most purportedly compelling government interests are what might be called practical, as opposed to symbolic or expressive, interests. Thus, in the lying electoral speech context, the practical interests sought to be promoted by the regulation may focus on pragmatic goals such as: reducing lying; promoting more meaningful campaigns; enhancing civic morale and participation; reducing the public's information-screening costs; penalizing irresponsible candidates; promoting regime authority and legitimacy; promoting public policy discussion and consensus-building; and so on. But it is also possible for a government to have an interest in sending a symbolic or expressive official message against electoral lying, even through criminal legislation, and even if it is conceded that the legislation will not, in practice, reduce the number of electoral lies. Such a purely expressive purpose, however, may not be judged to be genuinely compelling.

109. The constitutional value of partial progress toward a goal varies according to the

misidentification of lies, or on issues of state of mind, or on a statement's substantial[110] truth, may be assigned great weight.

Courts must somehow reach some conclusions in this regard in order to implement the first, or compelling government interest, prong of strict scrutiny. But the need to compare likely gains and losses under alternative policies itself again carries the court into the second, or sufficiently narrow tailoring, prong of strict scrutiny.[111] The two prongs are again actually inseparable, and they require at least some degree of empirical insight, predictive capacity, and normative judgment, at both the fact-specific and at the broader principle or policy levels.[112]

A further basic problem with which judges applying strict scrutiny must somehow cope is that, in the words of two leading social scientists, "[i]n innumerable cases what is in principle predictable is, today, in fact unpredictable."[113] The possibility that events relevant to compellingness of interests, narrowness of tailoring, causation, and the practical feasibility of alternative regulations[114] might in principle be predictable does little practical good. If the court cannot say whether some alternative regulation is nearly as effective as the rule being scrutinized,[115] while also less significantly burdensome on speech rights overall,[116] much of the logic of strict scrutiny disappears. Why should

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nature of the underlying problems, priorities, obstacles, and circumstances. Reducing the number of instances of campaign lying by, say, 30% may count as a meaningful improvement, but perhaps not of constitutionally compelling status. By contrast, removing all the electronic bugs in a room but one, or removing all the hidden explosives in a room but one, may not count even as a significant gain, let alone one of compelling value.

110. As a matter of common sense, if a reviewing court considers itself competent to pass judgment on the degrees of truth and falsity of the underlying alleged lie, the court may also wish to judge some technically false claims to be substantially true, which again requires that the court assess the importance or triviality of the ways in which the alleged lie can be said to be false. Several of the allegedly defamatory claims of fact in the classic *Sullivan* libel case were held to be technically, but inconsequentially, mistaken, even in combination. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 258–59, 264–65 (1964).

111. For a discussion of this relationship, see R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 HOFSTRA L. REV. 195 (2008).

112. *Id.*

113. ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE 82 (Transaction Publishers 1992) (1953).

114. For typical inconclusive, speculative, factually unconstrained skirmishing over the likely effectiveness and feasibility of arguably less speech-burdensome regulations, see the prevailing and dissenting opinions in, for example, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669–71 (2011), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996). There is often little to prevent a reviewing court from simply asserting the feasibility and effectiveness, to some sufficient degree, of one or more hypothetical alternative regulations, with that alternative regulation also being casually assumed to really be "narrower," or less burdensome, all things considered, on the speech rights of all those potentially affected.

115. *See 44 Liquormart, Inc.*, 517 U.S. at 507.

116. *See id.*

the unconstrained guesses of courts on largely empirical matters beyond anyone's grasp prevail over contrary guesses by legislatures?[117]

Judges trying to work through strict scrutiny tests can certainly draw upon the testimony, the briefs, and their own life experiences. The most basic underlying problem, however, is that the limited relevant information rarely exists in any conveniently "concentrated or integrated form, but as dispersed bits of incomplete and frequently conflicting knowledge which all the separate individuals possess."[118] Does any single judge, for example, know what percentage of electoral speech generally should count as a lie, or how frequently electoral lies are believed?

Courts attempting to apply strict scrutiny in a responsible way thus face a daunting task. Compounding the problem even further is that the policy options they consider do not come with all of their important consequences—short- and long-term, direct and indirect—inscribed on their faces.[119] Consider the various possible effects, over time, of trying to legislatively or administratively suppress an idea, including the resulting instances of cowardice, ignorance, resentment, and martyrdom.

Judges applying strict scrutiny must also be especially aware that the most important consequences of any policy may be denied or unforeseen. These unforeseen policy consequences may be favorable, unfavorable, or both. But the aggressive, multifaceted judicial review called for by strict scrutiny should humbly recognize that the enacting

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117. Even if we assume that courts are more evenhanded and less biased than legislators and administrators in free speech cases, it is unclear why courts would systematically better understand how various parties might be affected by various kinds of regulations, or which regulations are likely feasible and likely more or less effective.

118. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945). Professor Friedrich A. Hayek is here making a stronger, less qualified claim. *See id.*; *see also* THOMAS SOWELL, KNOWLEDGE AND DECISIONS 40 (1980) (describing courts as generally less inclined than economic or more political institutions to engage in "close weighing of incremental costs and incremental benefits"). Contrary to Professor Thomas Sowell, however, we could say that, ideally, the narrow tailoring inquiry is an attempt to assess the incremental costs of alternative policies. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS ch. 1 (2004) (examining a variety of ways to capture the collective wisdom of groups and concluding that to do so successfully requires satisfying several conditions: diversity, independence, and decentralization). For a general discussion of cost-benefit analysis and of incrementalist decisionmaking strategies, see COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric A. Posner eds., 2001); *see also* DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS ch. 5, at 81–93 (1963) (describing "disjointed incrementalism" as a margin-oriented policy analysis strategy imposing fewer information demands on the decisionmaker, while admittedly excluding some policy options and some consequences from consideration); DAHL & LINDBLOM, *supra* note 113; E.J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS (5th ed. 2007).

119. *See supra* notes 111–18 and accompanying text.

legislature, the reviewing court, or both may fail to anticipate important consequences—including the spectacular costs, if not the disastrous failure—of any given policy alternative.

A statute seeking to regulate electoral lies might, for example, deter a surprising amount of protected speech.[120] This effect might vary over time. Much of this effect could go unreported and realistically be unprovable. Important consequences may be publicly "invisible" or abstract. Often, courts do not demand much rigorous, compelling causal evidence of a chilling effect on speech—and rightly not.[121] Or a perhaps surprisingly minimal amount of protected speech might be deterred or changed in phrasing. An alternative statute might change these amounts in surprising ways. It might even be that a broader, less narrowly tailored regulation may actually deter less protected speech, if that less narrowly tailored rule is clearer and easier for everyone to apply in many cases.

The problems of unanticipated policy consequences, especially over time, must not be minimized in their frequency and gravity. The basic idea of the importance of unanticipated consequences has been widely discussed, by writers including Bernard Mandeville,[122] Adam Smith,[123] G.W.F. Hegel,[124] Frederic Bastiat,[125] John Dewey,[126] Robert Merton,[127]

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120. *See, e.g.*, State v. 119 Vote No! Comm., 957 P.2d 691, 694–96 (Wash. 1998) (en banc).

121. *See, e.g.*, *id.*

122. *See, e.g.*, BERNARD MANDEVILLE, THE FABLE OF THE BEES 67 (Phillip Harth ed., 1970) (1724) ("Thus every Part was full of Vice, / Yet the whole Mass a Paradice.").

123. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 129–30 (Laurence Dickey abridged ed. 1993) (1776) ("[H]e intends only his own gain, and he is . . . led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectively than when he really intends to promote it.").

124. *See, e.g.*, GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY 89 (Hugh Barr Nisbet trans., 1981) (1830).

125. *See, e.g.*, FREDERIC BASTIAT, THAT WHICH IS SEEN, AND THAT WHICH IS NOT SEEN (trans. unidentified) (1850), *available at* http://bastiat.org/en/twisatwins.html.

126. *See, e.g.*, JOHN DEWEY, HUMAN NATURE AND CONDUCT 229 (Dover ed. 2002) (1922) ("It is willful folly to fasten upon some single end or consequence which is liked, and permit the view of that to blot from perception all other undesired and undesirable consequences. . . . Yet this assumption is continually made."). Dewey may have in mind here not only unintended and unforeseen consequences, but foreseen consequences that are in some way discounted, irrationally minimized, or dismissed from consideration. Both of these categories recur throughout the strict scrutiny cases. Guesses must be made, for example, about the likely financial costs of alternative policies ten or twenty years into the future. Often, those policy guesses reflect preferences as much as historical experience.

127. *See, e.g.*, Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 899 (1936) (recognizing what would today be called "path dependence," in which slight initial differences or changes in circumstances may be amplified into dramatically different outcomes over time, creating further difficulties for an aggressive

and Daniel Bell.[128] Ambitious, speculative forms of judicial review, including strict scrutiny, are of course especially vulnerable to unanticipated consequences of various sorts.

As several writers have recognized,[129] contemporary official decisionmaking has not escaped the problems of unanticipated consequences. Thus in the realm of public and private decisionmaking generally, there are, for example: reports of law schools gaming the ranking systems in unanticipated ways; golf carts qualifying for electric vehicle tax credits; archeological objects being broken into parts for greater collector payments; production runs of all left shoes to meet a centralized shoe production quota; leaving old and intensely polluting sources unmodified in order to avoid expensive regulations; energy-efficient refrigerator subsidies increasing the use of second, "beer refrigerators"; disastrous introduction of non-native plant and animal species; emphases on public school math and English test scores as reducing attention to other important subjects; libel and privacy law as reducing the number and usefulness of recommendation letters; the ban on DDT as adversely affecting the incidence of malaria; conscious efforts to raise student self-esteem as adversely affecting other traits; and mortgage-lending eligibility rules having unanticipated adverse consequences.[130]

Unanticipated consequences, favorable and unfavorable, inevitably arise to one degree or another as a result of any kind of decisionmaking process. But courts that undertake the especially ambitious, nondeferential[131] task of strict scrutiny review, including requiring

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narrow tailoring analysis). For background on path dependence, see, for example, Stephen E. Margolis & S.J. Liebowitz, *Path Dependence*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 17–22 (Peter Newman ed., 1998).

128. *See, e.g.*, DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM ch. 1, *afterword* (20th anniversary ed. 1996) (1976); *see also* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958) (1905).

129. *See, e.g.*, Richard Vernon, *Unintended Consequences*, 7 POL. THEORY 57, 60 (1979) (noting distinctive "threshold" and "trigger" effects). More broadly, see JOHN MANSFIELD, THE NATURE OF CHANGE OR THE LAW OF UNINTENDED CONSEQUENCES: AN INTRODUCTORY TEXT TO DESIGNING COMPLEX SYSTEMS AND MANAGING CHANGE 181–82 (2010). For an often entertaining online collection, see *Museum of Unintended Consequences*, CAL. STATE UNIV., L.A., DEP'T COMPUTER SCI. WIKI, http://cs.calstatela.edu/wiki/index.php/Courses/CS_461/Museum_of_unintended_consequences (last visited Feb. 17, 2012) (cataloging unintended consequences in various contexts); *see also The Law of Unintended Consequences*, GLOBE-NET, www.globe-net.com/articles/2010/june/17/the-law-of-unintended-consequences (last visited Feb. 17, 2012) (listing several instances of disastrous unintended consequences). On perverse incentives specifically, see Sean Masaki Flynn, *Perverse Incentives*, FORBES, Feb. 19, 2009, http://www.forbes.com/2009/02/19/incentives-compensation-bonuses-leadership_perverted_incentives.html (last visited Feb. 17, 2012). More broadly, see C. NORTHCOTE PARKINSON, PARKINSON: THE LAW (1st American ed. 1980) (1957).

130. *See supra* notes 124–25.

131. Several cases have discussed the placement of the burden of proof on the government

sufficiently compelling causal proof, are subjected to cognitive demands and burdens of an extraordinary sort. The costs of mistakes in applying strict scrutiny, however, typically appear only gradually, over time, and may not only be widely dispersed, but nearly invisible to most citizens, and they may be untraced to the particular reviewing court, which in any event need not accept any real responsibility for unanticipated costs. The costs of applying strict scrutiny may even be blamed on the text of the Constitution or on the drafters of a statute.

For generalist judges applying strict scrutiny, many actually likely results will seem unlikely or counterintuitive.[132] This will be especially true whenever statistics and probability[133] or science and technology are involved.[134] Reality often defies common sense—trained or untrained. Guesses at comparative probabilities are often unavoidably near the heart of strict scrutiny analysis in any legal context.

Similarly, strict scrutiny even allows scope for judges to dismiss, ignore, diminish, or reframe reasonably foreseeable, or even intended, policy consequences[135] that many affected persons would think of as significant costs. This may happen consciously or subconsciously[136] in any given strict scrutiny case. Too many strict scrutiny cases are presented by their judges as much easier than they are. This general

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under strict scrutiny. *See, e.g.*, Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2738–42 (2011) (requiring rigorous causal proof); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464–65 (2007); Johnson v. California, 543 U.S. 499, 505 (2005) (defining strict scrutiny review of racial classifications, as distinct from electoral speech or other free speech cases); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978).

132. *See infra* notes 133–34 and accompanying text.

133. Consider, for example, the natural inclination to believe that a positive result of a well-credentialed medical test means that the patient probably has the disease, even where the baseline incidence of the disease in question is quite low. *See* Jeffrey J. Rachlinsky, *Heuristics, Biases, and Governance*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISIONMAKING ch. 28 (Derek J. Koehler & Nigel Harvey eds., 2004); *see also id.* at 570 ("Judges and juries seem to lack the cognitive abilities necessary to make proper statistical inferences."). Unfortunately, statistics and probability judgments of various complex sorts pervade strict scrutiny. For a general collection of counterintuitive mathematical results, see JULIAN HAVIL, IMPOSSIBLE: SURPRISING SOLUTIONS TO COUNTERINTUITIVE CONUNDRUMS (2008).

134. For an admittedly extreme case, see the real-world application of quantum phenomena. *See* JOHN POLKINGHORNE, QUANTUM THEORY: A VERY SHORT INTRODUCTION 24 (2002) ("The superposition principle implies . . . that it is no longer possible to form a clear picture of what is happening in the course of physical processes."); *see also* PHILOSOPHICAL CONSEQUENCES OF QUANTUM THEORY: REFLECTIONS ON BELL'S THEOREM (James T. Cushing & Ernan McMullin eds., 1989).

135. *See* Patricia Cohen, *Reason Seen More as Weapon than Path to Truth*, N.Y. TIMES, June 15, 2011, at C1, *available at* www.nytimes.com/2011/06/15/arts/people-argue-just-to-win-scholars-assert.html?pagewanted=all.

136. *See id.*

phenomenon is certainly not new,[137] but strict scrutiny analysis, particularly in a politically polarized and largely adversarial culture,[138] is especially vulnerable to such failings.

More generally, despite the insulation, in certain respects, of federal judges, the more ambitious the form of judicial review, the more likely the court is to fall victim to one form or another of cognitive bias. Judges, no less than politicians or economic advisors, are capable of coping mechanisms, such as denial.[139] Some very real possibilities may be considered too disturbing and are therefore treated as unreal or unlikely and unworthy of sustained conscious reflection.[140] As one scholar describes the general phenomenon, "Negative information tends to be regarded as less valid, less accurate, and explainable by external factors."[141]

The number of the identified cognitive and related biases[142] to which judges applying ambitious strict scrutiny may be susceptible continues to grow.[143] Illustrative of such general bias are the tendency to begin our decisionmaking from arbitrary anchoring points[144] and then to make insufficient adjustments,[145] to over- and underemphasize particular items of information;[146] to calculate gains and losses against some aspiration rather than the status quo;[147] to overemphasize the

137. *See, e.g.*, Frank H. Knight, *Social Causation*, 49 AM. J. SOCIOLOGY 46, 52 (1943) ("There seems to be some innate repugnance in human nature against . . . rationally facing the problem of choice as a comparison of possible alternatives. Human nature seems to be fundamentally romantic in this regard; men in general hate any reference to 'costs,' which means simply the deliberate comparison of alternatives."). This is compatible with the more basic point, with which strict scrutiny is uncomfortable, that "[i]t is not usually possible to predict the actual magnitude of a dependent variable at any moment, as a function of time, because the necessary data are not available." *Id.* at 51–52.

138. *See* Cohen, *supra* note 135; Wright, *supra* note 68, at 129.

139. *See, e.g.*, RICHARD S. TEDLOW, DENIAL: WHY BUSINESS LEADERS FAIL TO LOOK FACTS IN THE FACE—AND WHAT TO DO ABOUT IT 33 (2010) ("Sometimes we divert information from awareness because it is too painful or stressful. . . . More commonly, we do so because the offending information contradicts assumptions with which we are comfortable, and it is easier to reject the information than to change our assumptions."); *see also* STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 1 (2011).

140. *See* TEDLOW, *supra* note 139, at 30–33.

141. DAVID HARDMAN, JUDGMENT AND DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 44 (2009).

142. For rigorous background, see HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

143. For a fascinating series of (extremely) brief entries, see *List of Cognitive Biases*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_cognitive_biases (last visited May 31, 2011).

144. *See* HEURISTICS AND BIASES, *supra* note 142, at chs. 6–8; HARDMAN, *supra* note 141, at 32.

145. *See* HARDMAN, *supra* note 141, at 32.

146. *See id.* at 63.

147. *See id.* at 76.

concrete, the visible, the personalized, and the short-term;[148] to be overconfident in our own judgments,[149] particularly when we perceive ourselves to have some control;[150] and to focus excessively on intentions and on intentions as driving actual results and long-term outcomes.[151] Perhaps most ominously of all, there is evidence that persons in the general position of judges "tend to overweight their own opinion relative to that of an adviser and to only shift a token amount toward the adviser's recommendation."[152] This may not bode well if judges in strict scrutiny cases regard the attorneys and witnesses in a case, including expert witnesses, as "advisers."

If we add to all of this the important role of emotion in deciding questions involving free speech,[153] alleged lying, elections, and sometimes intense partisanship, we must doubt that judicial strict scrutiny in practice resembles strict scrutiny as it is depicted in the case reporters.[154] Professor David Hardman concludes much more generally that "[a] considerable body of evidence indicates that people have little, if any, insight into the process underlying their judgments and decisions. . . . [P]eople's reports on their own behavior are essentially rationalizations."[155]

It may be that judges sometimes try to minimize all of the various complications noted above in this Article. But it is realistically asking too much of judges to follow and to be genuinely guided by the demanding requirements of strict scrutiny in cases of alleged electoral lying. Is the application of strict scrutiny, as specified in the cases, ultimately unattainable, and a way of rationalizing judicial outcomes reached on other grounds?

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148. *See id.* at 90.

149. *See id.* at 94; *see also* PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? ch. 3 (2006).

150. *See supra* note 129.

151. *See* HARDMAN, *supra* note 141, at 115; *see also* notes 122–28 and accompanying text.

152. HARDMAN, *supra* note 141, at 156.

153. *See id.* at 185 ("It is now clear that emotions play a prominent role in decision making"); R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429, 455–59 (2003).

154. *See* HARDMAN, *supra* note 141, at 185–86; *see also* Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

155. *See* HARDMAN, *supra* note 141, at 186 (citing Nisbett & Wilson, *supra* note 154). For further discussion of the role of emotion and of subconscious processes in moral judgments, see, for example, Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001), and Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

CONCLUSION: CAN THE STANDARD PRACTICE OF STRICT SCRUTINY REALISTICALLY BE IMPROVED?

At this point, strict scrutiny, with its two familiar components along with causation, is probably too well-entrenched and too manipulable to be abandoned. But it is also fair to imagine that legal cultures can change over time to some degree, even if the legal tests and terminology formally remain the same.

One extreme approach would be to set aside the idea of a strict scrutiny test as substantively dictating the outcomes of cases. Under this revised view, we would instead interpret strict scrutiny in terms of mere procedural requirements rather than substantive requirements. Courts could ask the relevant legislature, in a properly litigated case, to talk "after the fact" in terms of possible compelling governmental interests, alternative policies, burdens, costs, and narrow tailoring. The legislature or agency's response to a court hearing the constitutional challenge need not be confined to legislative history but could be brief, depending on the scope and stakes involved in the given case. Courts would then typically review this response merely for evidence of meaningful legislative reflection, in roughly the same way an agency is required to prepare an adequate Environmental Impact Statement[156] under the National Environmental Policy Act (NEPA).[157] There is, by analogy, no substantive requirement that the agency involved actually rank environmental effects among its highest agency priorities.[158] No genuinely convincing cost estimates or causal scenarios need be provided. The goal of NEPA in this regard is instead to procedurally improve agency decisionmaking. Roughly, an affected agency must publicly articulate evidence that it has conscientiously thought about alternative policies and a number of the potential environmental costs and other effects of the proposed agency action.[159] This is essentially a matter of procedural compliance by the agency. Acute foresight, substantive convincingness, and practical wisdom are not required.

By loose analogy, one might choose to think of a procedural strict scrutiny analysis as requiring the court itself and then the underlying government regulators, given the court's guidance, to reflect conscientiously on some of the significant interests, likely results, and possible costs of the proposed and alternative policies potentially available. The court would then review the legislators' response merely

156. See the crucial statutory provision at 42 U.S.C. § 4332 (2010).

157. See *id.* as initially adopted in 1970.

158. *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–52 (1989); J.B. RUHL, JOHN COPELAND NAGLE & JAMES SALZMAN, THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW 433–34 (2008).

159. *See Robertson*, 490 U.S. at 349–52; RUHL, NAGLE & SALZMAN, *supra* note 158, at 433–34.

for conscientious procedural compliance, roughly as in the NEPA cases. This procedural strict scrutiny would thus typically amount to a requirement that the challenged legislature perform, in the present, an examination of the legislation or a regulation thereunder, in general or as applied in the particular case circumstances.

Under procedural strict scrutiny, the reviewing court would not generally strike down legislation or a government act on substantive constitutional grounds by applying strict scrutiny, except in rare circumstances. Crucially, though, if a court were so inclined it could still at any point decide any case on the constitutional merits, but by means of some relevant specialized free speech test or on the basis of some general constitutional test other than strict scrutiny. Patently unfair and unequal or hostility-based legislation can be struck down without recourse to strict scrutiny.

Of course, lower levels of judicial scrutiny are subject to abuse, as well, but such tests generally are not as unrealistically ambitious or as variously and unrealistically demanding on the abilities of courts.

It is also possible that the current legislature may actually be unsympathetic to the challenged legislation. But if the current legislature's own assessment of the legislation is largely unsympathetic, the legislature's publicly and clearly declaring so could be treated by a reviewing court as an amendment, limitation, or even repeal of the initial legislation. The current legislature could then or later choose to rewrite the legislation in question, subject to further possible judicial review.

A looser, more proceduralist interpretation of strict scrutiny might either reduce or increase predictability in the law. This effect would be unclear in advance. But we must also remember the various forms of speculation and manipulability of strict scrutiny as it is currently practiced.[160] In particular, we should remember the opposing directions strict scrutiny has taken us in the specific context of deliberate lying in electoral contexts.[161]

Another separate approach to the problems of strict scrutiny might be to simply abandon the formal two-part strict scrutiny test, based on the unrealism of and various weaknesses in the test.[162] In some strict scrutiny cases, a single consideration or group of considerations may intuitively strike us as really decisive. The full grounds of even our best intuitions cannot be explicitly articulated. In such a case, pretending that our intuitive result is meaningfully validated by—let alone really derived from—following the unrealistic and over-ambitious two-part

160. *See supra* Parts II, III.

161. See *supra* Part I for the varying outcomes even among the cases explicitly applying strict scrutiny.

162. *See supra* Parts II, III.

strict scrutiny test is artificial and misleading at best. Honesty and legitimacy require that the courts, along with the rest of us, concede the importance of what we might call trained or habituated, and ideally, well-disciplined intuition.

Some judges evidently have the present intuition that a deliberate electoral lie in practice undermines free speech and electoral politics more than it promotes them.[163] Other judges, on their own equally careful consideration, may somehow intuit that the risks of error, partisanship, and abuse inherent in allowing legislatures, agencies, prosecutors, and courts to adjudicate cases of electoral lying far exceed any likely benefits to free speech, untainted elections, and democracy.[164]

Thus, judicial intuitions may in the most difficult and most speculative cases sometimes conflict, even with experience over long periods of time. But judicially relying on intuition, derived from a careful and conscientious study of both precedent and any other graspable and apparently relevant consideration, is often justifiable,[165] if not always inevitable.[166] Judicial intuitions need not and should not be stated in a bald and unreasoning way, or casually arrived at; there is usually much that can be said in a judicial opinion in support of a sensible judicial intuition.[167]

A court that is not bound by the unrealistic pretenses of the strict scrutiny formula would usefully illustrate that most interesting free speech and equal protection cases cannot reliably be decided by formula or mechanically. Legislative reflections and judicial intuitions may reflect ultimately different degrees of practical wisdom,[168] judicial self-restraint, and reason-grounded humility[169] in the face of unavoidable complexity. In fact, it is ultimately possible that the presence or absence of these virtues may be even more important than the continued use or replacement, in electoral speech cases or elsewhere,[170] of typical forms

163. *See, e.g.*, *supra* notes 73–75 and accompanying text.

164. *See, e.g.*, *supra* notes 78–83 and accompanying text.

165. *See generally* R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1382–85, 1420–24 (2006) (describing the decisionmaking process through which judges often go in reaching their final judgments).

166. *See id.*

167. *See id.* Others have discussed a sophisticated version of contemporary moral intuitionism. *See* MICHAEL HUEMER, ETHICAL INTUITIONISM (2008); *see also* ROBERT AUDI, MORAL KNOWLEDGE AND ETHICAL CHARACTER (1997); ETHICAL INTUITIONISM: RE-EVALUATIONS (Philip Stratton-Lake ed., 2003).

168. *See, e.g.*, R. George Wright, *Whose* Phronesis*? Which* Phronimoi*?: A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817 (1996) (exploring the concept of practical wisdom).

169. *See supra* note 93.

170. Note that the Supreme Court unanimously appreciated the stigmatizing and material inequalities of the public school systems at issue in *Brown v. Board of Education*, 347 U.S. 483

of judicial strict scrutiny.

(1954), without artificial recourse to a formal strict scrutiny test.